ALAN WILSON
ATTORNEY GENERAL

April 16, 2020

The Hon. Sabrina Gast
President, South Carolina Coroner's Association
PO Box 12304
Columbia, SC 29211

Dear Ms. Gast:

We received your request seeking an opinion on the release of information about COVID-19 decedents. This expedited opinion sets out our Office's understanding of your question and our response.

Issue (as quoted from your letter):

> I am writing with an urgent request for guidance for the Coroners of South Carolina. As the chief death investigators in the state, we are obligated to investigate any death that occurs within our jurisdiction. Along with the death investigation, comes releasing of information related to the death. Under normal circumstances, after next of kin has been located and notified, this information is released to media outlets. This information includes name, age, location of incident and the cause of death, if available. During the pandemic, many of the coroner's have been approached and asked to identify COVID-19 decedents. Most of the time, natural deaths are of no interest to media, however, you can imagine that in our current environment, the media is very interested. Our concern grows out of safety of the families left behind. We would like an opinion on whether or not the names of these individuals must be released to media.

Law/Analysis:

A court may well conclude that established South Carolina case law controls and hold that death certificates listing COVID-19 as a cause of death are subject to disclosure based upon that precedent. However, a court also could reasonably conclude that under the circumstances of the current declared public health emergency, Section 44-4-560 limits disclosure of protected health information describing the cause of death. S.C. Code Ann. § 44-4-560(A) (2018). This opinion cannot opine definitively as to precisely how a court would rule on this question, but we will undertake to discuss the relevant law as fully as we are able under the circumstances.

This opinion has been expedited and will not undertake an exhaustive analysis of all applicable law. It should be read and understood in the context of the law cited and the current circumstances.

First, a court may well conclude that established South Carolina Supreme Court precedent controls and requires the disclosure of death certificates listing COVID-19 as a cause of death. The SC Supreme Court held in *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), that a death certificate is a public record which must be provided pursuant to a FOIA request. The Court in *Sexton* weighed and rejected several arguments against disclosure, including an argument based on the right to privacy, writing:

> Generally, privacy rights are considered personal rights which do not survive. *See* 18 A.L.R.3d 873 (1968), 62 Am.Jur.2d, Privacy, § 12 (1972). In addition, "one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest." *Meetze v. Associated Press*. 230 S.C. 330, 95 S.E.2d 606, 609 (1956).

283 S.C. at 566, 324 S.E.2d at 315. The facts before the Court in *Sexton* were that the decedent had been murdered, and the case was "of great public interest." *Id.*

Conversely, the South Carolina Supreme Court held in *Perry v. Bullock*, 409 S.C. 137, 761 S.E.2d 251 (2014) that "an autopsy report is exempt from the FOIA's disclosure requirement." The Court reasoned:

> The FOIA requires public bodies to disclose public records upon request and defines public records as "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." S.C. Code Ann. § 30-4-20. However, "[r]ecords such as ... medical records ... and other records which by law are required to be closed to the public" are not considered to be made open to the public under the provisions of [the FOIA]. *Id.*

409 S.C. at 141, 761 S.E.2d at 253. Following the decision of the Court in Bullock, our Office considered whether toxicology reports also should be deemed to be "medical records" for the purposes of FOIA. *Op. S.C. Att'y Gen.*, 2016 WL 1167292 (February 24, 2016). There we opined:

> We readily acknowledge that the Supreme Court's *Bullock* analysis is much different from that of our prior opinions and even from the Court's earlier decision in *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219 (1991). Like our prior opinions, *Bellamy* had concluded that FOIA does not mandate confidentiality in a given circumstance. Instead, the *Bellamy* Court concluded that FOIA is a remedial statute and that exemptions in FOIA do not mandate nondisclosure....
>
> Nevertheless, regardless of our previous analysis, the Court's decision in *Bullock* is now the governing law. Thus, we are constrained by this decision. Accordingly, while not free from doubt, we believe the Court is likely to adhere to its *Bullock* analysis in a case involving toxicology reports, deeming such reports to be "medical records" and therefore confidential.

Op. S.C. Att'y Gen., 2016 WL 1167292 (February 24, 2016). Thus, while *Society of Professional Journalists v. Sexton* concluded a death certificate is a public record, the holding of the Supreme Court in *Perry v. Bullock* has been understood generally to limit public access to other medical records which a coroner might possess, even under normal circumstances. For a fuller discussion of this issue, we refer the reader to the opinion of this Office regarding toxicology reports: *Op. S.C. Att'y Gen.*, 2016 WL 1167292 (February 24, 2016).

Moreover, the Court in *Sexton* was not called upon to consider the application of the FOIA in a public health emergency. *See Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984). During a public health emergency, South Carolina Code Section 44-5-560 governs access to protected health information. S.C. Code Ann. § 44-5-560(A) (2018). That statute reads in relevant part:

> (A) Access to protected health information of persons who have participated in medical testing, treatment, vaccination, isolation, or quarantine programs or efforts by DHEC during a public health emergency is limited to those persons having a legitimate need to:
>
> (1) provide treatment to the individual who is the subject of the health information;
>
> (2) conduct epidemiological research; or
>
> (3) investigate the causes of transmission.

Id. The Code also defined "protected health information" to include

> "any information . . . that relates to an individual's past, present, or future physical . . . health status . . . and that reveals the identity of the individual whose health care is the subject of the information, or where there is a reasonable basis to believe such information could be utilized (either alone or with other information that is, or reasonably should be known to be, available to predictable recipients of such information) to reveal the identity of that individual."

S.C. Code Ann. § 44-4-130(O) (2018).

Under the unprecedented facts presented by the current pandemic, a court faced with this question would rely upon the rules of statutory construction to give effect to the intention of the Legislature in codifying the various statutes set out above. As this Office has previously opined:

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005).

Turning to the text of Section 44-4-560, the Legislature plainly intended to restrict access to protected health information of persons tested, isolated, and/or quarantined pursuant to the actions of DHEC in the course of a public health emergency. We understand this would typically be the case for an individual who dies as result of COVID-19. Accordingly, a court may well conclude that the Section 44-4-560 prohibits identifying COVID-19 decedents.

Conclusion:

In summary, a court may well conclude that *Sexton* controls and hold that death certificates listing COVID-19 as a cause of death are subject to disclosure based upon that precedent. *See Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984). However, the holding of the Supreme Court in *Perry v. Bullock* has been understood generally to limit public access to other medical records which a coroner might possess, even under normal circumstances. *Op. S.C. Att'y Gen.*, 2016 WL 1167292 (February 24, 2016). Moreover, the Court in *Sexton* was not called upon to consider the circumstances of a declared public health emergency such as the current one. *See Sexton* (death resulting from murder). For

that reason, a court may well conclude instead that Section 44-4-560 limits disclosure of protected health information describing the cause of death as a result of the current pandemic during the ongoing public health emergency. S.C. Code Ann. § 44-4-560(A) (2018). This reading depends on those persons dying of COVID-19 being tested, isolated, and/or quarantined prior to death – as we understand would typically be the case.

"On numerous occasions, in construing FOIA, we have emphasized the Legislature's expressed policy of openness in government, as articulated in § 30-4-15." *Op. S.C. Att'y Gen.*, 2007 WL 4284629 (November 6, 2007). "Moreover, this Office strongly favors the policy of public disclosure in case of doubt." *Op. S.C. Att'y Gen.*, 2010 WL 2320805 (May 17, 2010). In those cases where, as here, it appears that there may be a limited exemption from disclosure, our Office has advised that a public body "should carefully examine the record in question and make the determination as to whether [the specific exemptions] override the general rule of disclosure." *Id.* Our Office stands by the policies and conclusions laid out in those opinions.

Additionally, we emphasize that this opinion is only advisory. Only a court can resolve this question with finality, especially given the unprecedented nature of the current emergency.

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

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